

SEP 19 1994

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
 Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
 OFFICE OF SECRETARY

In the Matter of

Amendment to Section 73.202(b)  
 Table of Allotments,  
 FM Broadcast Stations  
 (TYLER, TEXAS)

) MM Docket No. 94-66

)

) RM-8469

)

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)

TO: John A. Karousos,  
 Acting Chief, Allocations Branch  
 Policy and Rules Division  
 Mass Media Bureau

**REPLY COMMENTS**

Gleiser Communications, Inc. (hereafter Gleiser), by its attorneys and pursuant to Sections 1.415 and 1.420 of the Rules, hereby replies to the Joint Comments of Freestone Broadcasting Company, Inc. & Russell-Fields, Inc., filed August 31, 1994.<sup>1/</sup> In support thereof, Gleiser hereby respectfully states as follows:

**I. INTRODUCTION**

1. On July 8, 1994, the Acting Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau, issued a Notice of Proposed Rule Making and Order to Show Cause, DA 94-967, looking toward (1) the substitution of Channel 221C3 for Channel 221A at Tyler, Texas, and the modification of Station KDOK(FM)'s license to specify operation on the higher powered channel; (2) the substitu-

<sup>1/</sup> These Reply Comments are timely filed on the first business day after the reply deadline (Section 1.4(e) of the Rules).

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tion of Channel 256A for Channel 221A at Fairfield, Texas, and the modification of Station KNES(FM)'s license to specify the change in channel; and (3) the substitution of Channel 277A for Channel 221A at Commerce, Texas, and the modification of Station KEMM(FM)'s license to reflect the channel change.

2. In his Notice (¶1), the Acting Chief acknowledged the willingness of Gleiser, which is the licensee of KDOK, to reimburse Freestone Broadcasting Company, Inc. (hereafter Freestone) and Russell-Fields, Inc. (hereafter Russell) for the reasonable expenses associated with the change in channels for Station KNES(FM) at Fairfield and Station KEMM(FM) at Commerce. In connection therewith, the Acting Chief also ordered Freestone and Russell to show cause why their licenses should not be modified to specify operation on Channels 256A and 277A (Ibid., ¶6).

3. On August 31, 1994, Gleiser filed its Comments reiterating its intention to reimburse the reasonable expenses of Stations KNES(FM) and KEMM(FM) for the changes to the new operating channels consistent with Commission policies with respect to such reimbursement and committed to apply for the Class C3 upgrade on Channel 221 if allotted, and upon grant, to modify its facilities in order to operate KDOK on Channel 221C3.

4. On August 31, 1994, Freestone and Russell also filed their Joint Comments in which they expressed "no objection to the proposed substitution of channel allotments at Fairfield and Commerce if [Freestone and Russell] are compensated for all of

their expenses incurred in the channel change" (emphasis in original) (Joint Comments, pp. 1-2).

## II. PROCEDURAL MATTERS

5. In his Notice (¶7), the Acting Chief directed, pursuant to Section 1.87 of the Rules, Freestone and Russell "not later than August 29, 1994, [to] file a written statement showing with particularity why their licenses should not be modified as proposed in the Order to Cause Show". Freestone and Russell did not file a written statement by the August 29, 1994, deadline. Rather, Freestone and Russell elected to file Joint Comments on the August 31, 1994, deadline for comment submission. The Joint Comments addresses not one iota the efficacy of the Commission's proposal, but rather is devoted exclusively to the compensation which the commenters believe Gleiser should pay them for the channel changes.

6. The objections of Freestone and Russell to the channel changes as expressed in their Joint Comments are a nullity. They missed the quite plain, August 29, 1994, deadline for the filing of their written statement showing with particularity why their licenses should not be modified as proposed. As a matter of law, their failure to respond timely to the Order to Show Cause is deemed a waiver of their right to file a protest (Section 1.87(g) of the Rules).

### III. THE MERITS

7. In their Joint Comments, Freestone and Russell assert:
- They will only agree to a channel change "if they are compensated to the extent that their respective stations could operate on the new frequencies without financial distress caused by the channel change.
  - They will only agree to the channel change if Gleiser "leaves them in the same financial position they now hold operating their facilities".
  - "[A]ny change in operating frequency at either facility will create major confusion for the two station's advertisers and listeners, which in turn would most certainly negatively impact on their ability to generate revenues".
  - Freestone would incur \$89,505.07 in reimbursable expenses to reposition KNES in the marketplace and change frequencies to Channel 256A.
  - Russell would incur \$32,530 in reimbursable expenses to reposition KEMM in the marketplace and change frequencies to Channel 277A.
  - If Gleiser does not agree to compensate Freestone and Russell in the above amounts then they "strongly object to any change in their respective operating frequencies".

8. The assertions of Freestone and Russell are utterly without merit. First, as noted above, these parties failed to file

a timely response to the Commission's Order to Show Cause; therefore, as a matter of law, they are estopped from objecting (strongly or otherwise) to the proposed changes in their respective operating frequencies.

9. Second, Freestone and Russell completely ignore a quarter century of precedent which requires a rule making proponent to reimburse licensees who must change channels for the reasonable and prudent expenses associated with such changes. These expenses will include (i) legal, (ii) engineering, (iii) equipment, (iv) printing, (v) promotion for new frequency, (vi) out-of-pocket nonreducible expenses while KNES and KEMM are off-the-air, and (vii) miscellaneous (telephone calls, etc.). FM Table of Assignments (Circleville, Ohio), 8 FCC2d 159, 163-64, 9 RR2d 1579 (1967).

10. It is, of course, not the Commission's expectation that the parties would come to an agreement concerning the reasonable and prudent amount of reimbursable expenses in the rule making process. Rather, if the Commission issues a report and order making the channel changes, it is the Commission's expectation that thereafter the parties will negotiate in good faith to conclude an appropriate reimbursement agreement. In the absence of such agreement, the Commission will make itself available for alternative dispute resolution (mediation, arbitration, etc.). Finally, in the absence of agreement (whether or not mediated), the Commission will at the request of a party or parties make findings and conclusions as to the amount of reasonable and prudent expenses subject to reimbursement under Circleville, supra, and subsequent

precedent. FM Channel Assignments (Churchville and Luray, VA, 6 FCC Rcd 1313 (1991); Peter Wayne Lechman, 8 FCC Rcd 3058, 72 RR2d 1143 (1993).

11. Gleiser would observe that if the Commission authorizes the proposed channel changes to 256A at Fairfield and 277A at Commerce, both KNES and KEMM will be eligible to upgrade their technical facilities (1) from 3 KW ERP/328 feet HAAT (or equivalent) to 6 KW ERP/328 feet HAAT (or equivalent), or (2) from Class A to Class C3 facilities (25 KW ERP/328 feet HAAT (or equivalent)). See the annexed Technical Exhibit of Graham Brock, Inc., dated September 14, 1994.

12. Remarkably, nowhere in the Joint Comments do Freestone and Russell acknowledge the very real opportunity for each of them to upgrade significantly their technical facilities as a by-product of the channel changes. If as these parties claim, both KNES and KEMM are "marginal operations" (Joint Comments, ¶6), most assuredly an upgrade to 6 KW or 25 KW would materially enhance their ability to increase audience and revenues.

13. Express acknowledgement aside, it would seem that Freestone and Russell expect Gleiser to pay for the upgrade of KNES and KEMM. See annexed Technical Exhibit. See also Joint Comments, Exhibit 5, p. 2 and the references to a new four-bay FM antenna and legal fees associated with application seeking frequency change and 6 KW ERP. See also Joint Comments, Exhibit 6, p. 4, referring to a new four-bay antenna as well as the attachments thereto referring to both a four-bay and a five-bay antenna.

14. It is, of course, not the Commission's expectation that a rule making proponent, such as Gleiser, will be obligated to pay the upgrade expenses which may be available to parties such as Freestone and Russell but which are a by-product rather than a condition precedent to the channel changes.

15. Gleiser would urge the Commission to affirm that it is not required to reimburse Freestone and Russell for expenses associated with an upgrade of their stations as distinguished from the reasonable expenses associated with the channel changes. Gleiser would also urge the Commission to reaffirm the duty of Commission licensees to negotiate in good faith<sup>2/</sup> and in that context to find here and now that "Advertising & Promotion" in the amount of \$59,522.25 for the KNES frequency change is absolutely unreasonable on its face (see Joint Comments, Exhibit 6, pp. 3-4).

#### IV. CONCLUSION

16. The Acting Chief's proposed amendment of the FM Table of Allotments (Notice, ¶5) is manifestly in the public interest. Not only would the changes permit KDOK to upgrade from Class A to Class C3 status, but the changes would also clear the way for both KNES and KEMM to upgrade either to 6 KW or C3 facilities. Gleiser would, therefore, respectfully urge the Acting Chief to amend the FM Table of Allotments as proposed.

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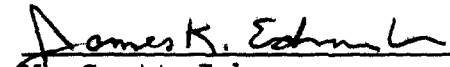
<sup>2/</sup> FM Channel Assignments (Castle Rock, Col., etc.), 8 FCC Rcd 4475, 73 RR2d 605, 607 (1993).

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Respectfully submitted,

**GLEISER COMMUNICATIONS, INC.**

By:

  
M. Scott Johnson  
James K. Edmundson

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Suite 900, East Tower  
Washington, D.C. 20005  
(202) 408-7100

DATED: September 19, 1994  
[90175]



**TECHNICAL EXHIBIT**

# GRAHAM BROCK, INC.

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BROADCAST TECHNICAL CONSULTANTS

**TECHNICAL REPLY COMMENTS**  
**NM DOCKET #94-66**  
**GLEISER COMMUNICATIONS, INC.**  
**TYLER, TEXAS**  
**September 1994**

**TECHNICAL EXHIBIT**

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**TECHNICAL REPLY COMMENTS**  
**MM DOCKET #94-66**  
**GLEISER COMMUNICATIONS, INC.**  
**TYLER, TEXAS**  
**September 1994**

**TECHNICAL STATEMENT**

1. These Technical Comments were prepared on behalf of Gleiser Communications, Inc. ("GCI"), licensee of radio station KDOK, Channel 221A, Tyler, Texas. GCI is the petitioner in MM Docket #94-66 requesting the upgrade of KDOK to Channel 221C3 at Tyler. In order to accommodate that upgrade, it is necessary to substitute Channel 256A for Channel 221A at Fairfield, Texas, and substitute Channel 277A for Channel 221A at Commerce, Texas.

**BACKGROUND**

2. In the comment period in MM Docket #94-66, a set of joint comments were filed by Freestone Broadcasting Company, Inc., licensee of radio station KNES, Fairfield, Texas, and Russell-Fields, Inc., licensee of KEMM, Commerce, Texas. The joint comments outlined the respective stations' concerns regarding the frequency changes and each submitted a list of expenses which would be incurred as part of the requested channel changes at these two communities.

## DISCUSSION

3. GCI maintains its willingness to reimburse the licensees of KNES and KEMM for reasonable expenses in facilitating the channel changes at their respective communities. While our analysis is not intended to be exhaustive, we observe that on the list of expenses submitted to the Commission that KNES has submitted a quotation from Nationwide Tower Company outlining the costs to replace the existing antenna system and install a new antenna system. It notes "remove single bay antenna from 500 foot tower and remove 7/8" transmission line from the tower" in favor of a new five bay antenna and 1 5/8" transmission line.<sup>1</sup> KNES operates on Channel 221 with an effective radiated power of 940 watts at 152 meters height above average terrain. Based on this documentation, it appears that the KNES transmitter will have to be capable of operating at a minimum of 3,000 watts to provide the necessary effective radiated power of the station. The installation of a five bay antenna system which has an inherent gain of 2.7 coupled with the efficiency of 1 5/8" transmission line would enable KNES to operate with an effective radiated power as high as 6.5 kilowatts. At 152 meters height above average terrain and 6.5 kilowatts, KNES's facilities would be in excess of a Class A radio station. GCI recognizes its responsibility to reimburse KNES for reasonable expenses in changing channels, which in this case due to the frequency change

1) The KNES licensee specifies a single bay antenna (BLH-850528KF).

proposed will likely require the replacement of KNES' existing antenna. However, GCI questions why a five bay antenna is listed on the quotation when KNES is presently using a single bay antenna for its existing Class A facility.<sup>2</sup>

4. KEMM is also requesting a replacement antenna which, due to the frequency change from Channel 221A to Channel 277A, is a reasonable expense under the circumstances. There was no documentation listing the existing KEMM antenna system, therefore, no determination could be made whether it was reasonable to replace the present KEMM antenna with a four bay antenna system.<sup>3</sup>

5. In the case of both stations, each noted in their tabulation of reimbursable expenses the necessity for engineering for an application seeking the frequency change. Both KEMM and KNES note \$1,500.00 each for the preparation of an application for the proposed change. However, based on previous Commission Report and Orders in rule making cases where stations were ordered to change channels, the stations were allowed to make

- 2) Elsewhere in the KNES list of expenses it notes a four bay antenna. However, this is contradictory to the quotation they received from the tower company to install the replacement antenna. In any event, a four bay antenna is significantly larger and more costly than simply replacing the single bay antenna system.
- 3) The KEMM CP application specified a three bay antenna (BPH-80103AE), but the CP specified an antenna system as required to achieve authorized ERP and MAAAT.

the channel substitutions at their existing sites by simply proceeding with the frequency change and notifying the Commission within ten days on FCC Form 302-FM. This is possible if no other changes are made to the facility. In this case, since both stations are Class A facilities operating with 3.0 kilowatt 100 meter equivalent stations, it may be possible that each could, upon the completion of this proceeding ordering them to their respective new channels, request that the new channels be placed on the Commission's automatic upgrade to 6.0 kilowatt list. This would enable them to change frequency and increase effective radiated power to 6.0 kilowatts simply by filing FCC Form 302-FM. Application for Construction Permit, FCC Form 301, would not be necessary in these instances. Any changes the licensees wish to make at the same time as the change of frequency should not be considered reasonable expenses which need to be reimbursed by GCI.

6. We would also observe that both KNES and KEMM could upgrade as reflected in the attached letter of the undersigned, dated August 15, 1994, to GCI.

7. The foregoing Technical Statement was prepared on behalf of Gleiser Communications, Inc., by Graham Brock, Inc., its Technical Consultants. The information contained herein is true and accurate to the best of our belief and knowledge.

# GRAHAM BROCK, INC.

BROADCAST TECHNICAL CONSULTANTS

August 15, 1994

Via Facsimile

Mr. Paul Gleiser  
Gleiser Communications  
1828 ESE Loop 323  
Suite 300  
Tyler, TX 75701

RE: KEMM  
Commerce, Texas

Dear Paul:

As you are aware, your Petition for Rule Making for the upgrade at Tyler, Texas, is now pending before the Commission. The upgrade requires the relocation of KEMM, Channel 221A, Commerce, Texas, to Channel 277. The substitution of channels can be made at the present KEMM transmitter site.

One additional item that we have previously discussed is the potential for this frequency to be improved to a C3 on Channel 277. This would enable KEMM, once the Commission orders the substitution, to avail itself of the upgrade by application regulations and request 25.0 kilowatts at its licensed site. The licensee could significantly improve the coverage of the facility by implementing the C3.

Should you have any questions regarding this potential, please do not hesitate to contact me and I will be happy to discuss this in further detail.

Sincerely,



Jefferson G. Brock  
Graham Brock, Inc.

JGB/mm

# GRAHAM BROCK, INC.

BROADCAST TECHNICAL CONSULTANTS

August 15, 1994

Via Facsimile

Mr. Paul Gleiser  
Gleiser Communications  
1828 SSE Loop 323  
Suite 300  
Tyler, TX 75701

RE: KNES  
Fairfield, Texas

Dear Paul:

As you are aware, your Petition for Rule Making is now before the Commission for consideration. As part of the upgrade request, it is necessary for KNES, Channel 221A, Fairfield, Texas, to change to Channel 256 where there will be no interference between the facilities.

As we previously discussed, once Channel 256 (99.1 MHz) is allotted to Fairfield, it would possible for the licensee to upgrade this to a C3 station. This can be done by simply filing an application proposing a C3. At the existing KNES transmitter site, there would be a minor shortspace to a station in Denton, Texas, also on Channel 256. However, it would be feasible to propose an intermediately powered C3 operating with 3.4 kilowatts at the present height above average terrain of KNES and still protect the Denton facility. The licensee at Fairfield could more than triple the power of the facility once the frequency change is approved by the Commission.

Should you have any questions regarding this, please do not hesitate to contact me.

Sincerely,

  
Jefferson G. Brook  
Graham Brock, Inc.

JGB/nmm



**AFFIDAVIT AND QUALIFICATIONS OF CONSULTANT**

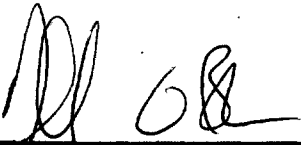
*State of Georgia )*  
*St. Simons Island ) ss:*  
*County of Glynn )*

**JEFFERSON G. BROCK**, being duly sworn, deposes and says that he is an officer of Graham Brock, Inc. Graham Brock has been engaged by Gleiser Communications, Inc., licensee of radio station KDOK, to prepare the attached Technical Exhibit.

His qualifications are a matter of record before the Federal Communications Commission. He has been active in Broadcast Engineering since 1979.

The attached report was either prepared by him or under his direction and all material and exhibits attached hereto are believed to be true and correct.

*This the 14th day of September, 1994*

  
\_\_\_\_\_  
Jefferson G. Brock  
Affiant

*Sworn to and subscribed before me  
this the 14th day of September, 1994*

\_\_\_\_\_  
Notary Public, State of Georgia  
My Commission Expires: September 8, 1995


**CERTIFICATE OF SERVICE**

I, Virginia L. Davidson, a secretary in the law firm of Gardner, Carton & Douglas, do hereby certify that true copies of the foregoing **REPLY COMMENTS** were sent September 19, 1994, by first-class United States mail, postage prepaid, or as indicated by hand to the following:

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Mass Media Bureau  
Federal Communications Commission  
2025 M Street, N.W., Room 8322  
Washington, D.C. 20554  
(By Hand)

Pamela Blumenthal  
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[Counsel for Freestone Broadcasting Company, Inc.  
and Russell-Fields, Inc.]

  
Virginia L. Davidson